

In the Matter of:)	
)	
Verizon Telephone Companies)	WC Docket No. 03-157
)	
Petition for Forbearance from the)	
Current Pricing Rules for the)	
Unbundled Network Element Platform)	
)	

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DC01/DAUBT/208936.3

SUMMARY

The Verizon Petition is nothing more than an attempt by a deep-pocketed dominant carrier to raise the costs of its competitors or eliminate competition entirely. Grant of Verizon's Petition would effectively eliminate UNE-P carriers and thus destroy local competition, particularly for residential subscribers like those served by Sage Telecom and Talk America. Unfortunately, even if the Commission denies the petition, Verizon has succeeded in raising the costs of its competitors by doing nothing more than recycling the same old arguments that the Commission and the Supreme Court have thoroughly considered and rejected. The Commission should not continue to allow ILECs like Verizon to impede competition by constantly challenging Commission decisions and policies based on arguments that the Commission and courts have considered and rejected.

Verizon presents no new arguments or facts to support the elimination of TELRIC pricing methodology or UNE-P. Instead, Verizon merely recycles the same exact arguments that the Commission and the Supreme Court have rejected, notes the current state of the telecommunications market, and says "see, we were right." However, Verizon fails to provide any evidence whatsoever to demonstrate that TELRIC pricing methodology or UNE-P is to blame for the woes of which it complains. In reality, grant of Verizon's petition would eliminate competition rather than serve the public interest by promoting competitive market conditions. Moreover, the Communications Act of 1934 ("the Act") precludes the Commission from granting Verizon's petition because sections 251 and 271 have not been fully implemented. For these reasons, and because Verizon has not met the standard for forbearance pursuant to Section 10, the Commission should deny the petition.

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Sage Telecom, Inc. (“Sage Telecom”) and Talk America Inc. (“Talk America”) (collectively, the “Joint Commenters”) hereby comment on the Petition for Expedited Forbearance from the Current Pricing Rules for the Unbundled Network Element Platform (“Verizon Petition”) filed by the Verizon Telephone Companies on July 1, 2003, pursuant to the Commission’s Public Notice dated July 3, 2003.¹ The Commission should deny the Verizon Petition for the reasons explained below.

Sage Telecom and Talk America are among the minority of competitive local exchange companies (“CLECs”) that provide competitive local voice services to residential customers. Unlike the vast majority of CLECs who have focused their competitive efforts on the business voice and data market segments, Sage Telecom and Talk America are two of the very

¹ *Pleading Cycle Established for Verizon Petition for Expedited Forbearance from the Commission's Current Pricing Rules for the Unbundled Network Element Platform*, WC Docket No. 03-157, Public Notice, DA 03-2189 (rel. July 3, 2003). The Commission later granted an extension of time to file comments and reply comments. *Verizon Telephone Companies; Petition for Forbearance from the Current Pricing Rules for the Unbundled Network Element Platform*, WC Docket No. 03-157, DA 03-2333 (rel. July 15, 2003) (setting comment date of August 18, 2003 and reply comment date of September 2, 2003).

few companies which have sought to fulfill the Act's promise of bringing competitive choice to telephone subscribers everywhere, including residential subscribers in urban, suburban and rural areas of the country. Sage Telecom currently serves nearly 500,000 residential and small business customers in primarily suburban and rural markets in ten states—including Arkansas, California, Indiana, Kansas, Michigan, Missouri, Ohio, Oklahoma, Texas, and Wisconsin. Talk America's customer base currently includes more than 430,000 local voice lines in twenty-seven states, including Georgia, Illinois, Indiana, Maryland, Massachusetts, Michigan, New York, Ohio, Texas and Wisconsin. Both Sage and Talk America continue to expand and offer a low-cost alternative to predominantly residential customers, many of whom are in rural and other underserved areas that would not otherwise see the benefits of local competition. All of Sage Telecom's lines, and the vast majority of Talk America's lines, are provisioned using the UNE-Platform ("UNE-P") loop/switching combination.

I. INTRODUCTION

The Verizon Petition is nothing more than an attempt by a deep-pocketed dominant carrier to raise the costs of its competitors or eliminate competition entirely. Grant of Verizon's Petition would effectively eliminate UNE-P carriers and thus destroy local competition, particularly for residential subscribers like those served by Sage Telecom and Talk America. Unfortunately, even if the Commission denies the petition, Verizon has succeeded in raising the costs of its competitors by doing nothing more than recycling the same old arguments that the Commission and the Supreme Court have thoroughly considered and rejected. The Commission should not continue to allow ILECs like Verizon to impede competition by constantly challenging Commission decisions and policies based on arguments that the

Commission and courts have considered and rejected. This is particularly true given that any action the Commission takes here would prejudice the upcoming TELRIC proceeding.

Verizon presents no new arguments or facts to support the elimination of TELRIC pricing methodology for UNE-P. Instead, Verizon merely recycles the same exact arguments that the Commission and the Supreme Court have rejected, notes the current state of the telecommunications market, and says “see, we were right.” However, Verizon fails to provide any evidence whatsoever to demonstrate that TELRIC pricing methodology or UNE-P is to blame for the woes of which it complains. In reality, grant of Verizon’s petition would eliminate competition rather than serve the public interest by promoting competitive market conditions. For this reason, and because Verizon has not met the standard for forbearance pursuant to Section 10 of the Telecommunications Act of 1996 (the “Act”), the Commission should deny the petition.

II. THE ACT PROHIBITS GRANT OF VERIZON’S PETITION BECAUSE SECTION 251 AND 271 HAVE NOT BEEN FULLY IMPLEMENTED

Verizon asks the Commission to grant its petition for forbearance pursuant to section 10 of the Act.² Although Verizon recognizes that “the Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented,”³ Verizon admits that sections 251 and 271 have *not* been fully

² 47 U.S.C. § 160. We note that Verizon has failed to comply with the procedural requirement that section 10(c) forbearance petitions be clearly identified in the caption as a petition for forbearance filed under section 10(c) of the Act. Accordingly, the petition should not be deemed a section 10(c) petition that triggers the statutory deadlines for resolution.

³ *Verizon Petition* at 19, n.38.

implemented.⁴ Nonetheless, Verizon argues that the Commission has the discretion to grant its petition because the Commission could have chosen other means to implement sections 251 and 271 rather than TELRIC-based rates for UNE-P.⁵ Verizon's argument has no merit.

The TELRIC pricing methodology is *the means* that the Commission adopted to implement *the requirements* of sections 251 and 271 after fully considering and rejecting the alternative proposals of other parties.⁶ For example, the Commission adopted the TELRIC pricing methodology as the means to implement the requirement of section 251(c)(3) that rates for UNEs are "just, reasonable and nondiscriminatory."⁷

The Supreme Court affirmed the Commission's decision to adopt the TELRIC pricing methodology over the alternative pricing proposals of Verizon and other ILECs.⁸ The Commission cannot now reverse this decision and impose an alternative pricing methodology without issuing a further notice of proposed rulemaking, gathering record evidence to determine whether reversal is appropriate, and adopting new rules, all of which would take a substantial amount of time.⁹ As such, grant of Verizon's petition would have the immediate result of complete forbearance with respect to the requirements of sections 251 and 271, because the Commission would have no available means for "applying the requirements of section 251(c) or

⁴ *Id.*

⁵ *Id.*

⁶ See, e.g., *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶¶ 674-715 (1996) ("*Local Competition Order*") (adopting TELRIC pricing methodology).

⁷ *Id.*; 47 U.S.C. §251(c)(3).

⁸ See *Verizon Communications Inc., v. FCC*, 535 U.S. 467 (2002).

⁹ Under Section 553 of the Administrative Procedure Act, an agency must conduct a formal notice and comment rulemaking anytime it seeks to amend or promulgate a "substantive" rule like the Commission's rules regarding the TELRIC-pricing methodology. 47 U.S.C. § 553(b) *Chamber of Commerce of the United States v. Occupational Safety and Health Administration*, 636 F.2d 464, 470 (D.C. Cir. 1980).

271.”¹⁰ Complete forbearance is, after all, Verizon’s goal, as evidenced by its failure even to propose any pricing methodologies that the Commission could use to replace TELRIC.¹¹ Therefore, the Act precludes the Commission from granting any aspect of the Verizon Petition because the requirements of sections 251 and 271 have not been fully implemented.

Verizon’s proposed interpretation of Section 10(d) would lead to absurd results that could not withstand appeal. Specifically, the requirements of sections 251 and 271 are not self-executing. As a practical matter, therefore, they can be applied only through the exercise of Commission discretion. If the Commission could forbear from applying rules and policies it adopted to implement the requirements of sections 251 and 271 simply because it could have exercised its discretion in the first instance to adopt different rules and policies, the limitation of section 10(d) would be meaningless. Accordingly, until the Commission determines that sections 251 and 271 have been fully implemented, the agency can amend the rules and policies it adopted to implement sections 251 and 271 using the traditional rulemaking procedures, but it cannot exercise forbearance pursuant to section 10(d) with respect to those rules.

In sum, Verizon has not provided any evidence that sections 251 and 271 have been fully implemented. Indeed, it is undisputed that sections 251 and 271 have *not* been fully implemented. Therefore, the Act requires the Commission to deny the Verizon Petition, because the Commission has no authority at this time to “forbear from applying the requirements of section 251(c) or 271” as Verizon requests.

¹⁰ 47 U.S.C. §160(d).

¹¹ It is hard to imagine any acceptable pricing methodology that Verizon could propose since the Commission has repeatedly rejected all alternatives that Verizon has proposed to date, and the Supreme Court has affirmed the Commission’s rejection of those proposals. *Verizon Communications Inc., v. FCC*, 535 U.S. 467 (2002).

III. VERIZON HAS FAILED TO MEET THE STANDARD FOR FORBEARANCE

Assuming *arguendo* that the Act does not preclude the Commission from granting the Verizon Petition, the Commission nonetheless must deny the petition because Verizon has failed to meet the standard for forbearance. The petition merely repeats the same arguments that have been rejected each time Verizon has made them, and thus it is nothing more than an untimely filed Petition for Reconsideration of the 1996 *Local Competition Order* in which the Commission adopted the TELRIC-pricing methodology.¹²

Verizon summarizes its arguments as follows: (1) “the TELRIC rules themselves are inherently flawed” because “TELRIC assumes a hypothetical, ideally efficient network” and thus “produces UNE rates that are lower than any real-world carrier can match”; (2) “the problems inherent in TELRIC are exacerbated by applying it to the so-called UNE platform” because UNE-P providers are “merely reselling services over existing facilities without making any investments”; and (3) “the problems are further compounded by the fiction embodied in current rules that UNE-P carriers are providing exchange access service”¹³ These same issues and arguments have been thoroughly considered and repeatedly rejected by the Commission.¹⁴

Verizon also has failed to advance any new policy concerns or unforeseeable circumstances that have developed since the Supreme Court rejected its arguments little more

¹² See 47 U.S.C. § 405 (“A petition for reconsideration must be filed within thirty days from the date upon which public notice is give of the order, decision, report, or action complained of”).

¹³ *Verizon Petition* at i-ii.

¹⁴ See, e.g., *Local Competition Order*, 11 FCC Rcd at ¶¶ 674-715.

than one year ago.¹⁵ Verizon claims that “actual market experience” shows that TELRIC has “devalued existing investments by incumbents and newer entrants alike,” “contributed to the massive decline in investment in the telecommunications industry” and “precluded the development of a rational wholesale market.”¹⁶ Verizon bases these claims entirely on the selected statements of a few analysts.¹⁷ However, Verizon fails to provide any evidence whatsoever to demonstrate that TELRIC pricing methodology or UNE-P is to blame for the woes of which it complains.

In any event, even if Verizon’s claim that current UNE-P rates “fail[] to compensate incumbents fairly for the use of their networks and discourages investment by all carriers”¹⁸ were correct, the proper remedy would not be forbearance from the TELRIC pricing rules altogether, but rather adjustment of the current rates by the relevant state regulatory authorities based on actual evidence presented by Verizon and other carriers providing service in that state. It is telling that Verizon does not even bother to suggest any alternative pricing methodologies, which is not surprising given that Verizon seeks to hinder existing competitors and keep potential entrants out by eliminating UNE-P rather than facilitating the competition envisioned by the Act. The bottom line is that neither the TELRIC pricing methodology nor the UNE-P is inherently flawed, as the Supreme Court confirmed when it examined and rejected the argument that TELRIC is unreasonable as compared to the alternatives that Verizon advocates.¹⁹

¹⁵ *Verizon Communications Inc., v. FCC*, 122 S Ct. 1646 (2002).

¹⁶ *Verizon Petition* at i-ii.

¹⁷ *See, e.g., Verizon Petition* at 5-6.

¹⁸ *Verizon Petition* at i.

¹⁹ *Verizon Communications*, 535 U.S. at 511-17.

In short, Verizon has failed to satisfy any of the three prongs for the statutory test for forbearance under §10(a) or demonstrate that forbearance would serve the public interest by promoting competitive market conditions,²⁰ as explained in more detail below.

A. Carriers Using Unbundled Network Elements, Including UNE-P, Have the Right Under the Act To Bill Access Charges.

Verizon has failed to provide any justification whatsoever for its suggestion that the Commission “could simply eliminate the fiction that a UNE-P carrier is providing exchange access on long distance calls” so that the underlying carrier would be entitled to the per-minute exchange access charges rather than the UNE-P carrier.²¹ As an initial matter, the TELRIC rate methodology is designed to ensure that the ILEC is compensated for 100% of its costs plus a reasonable profit.²² Accordingly, Verizon is requesting the Commission to implement a new implicit subsidy designed to provide Verizon with revenues that far exceed 100% of its costs plus a reasonable profit.²³

There is no basis under the Act or traditional ratemaking principles for an ILEC to collect per-minute access charges over and above TELRIC rates they receive from the UNE-P Carrier, which compensate the ILEC for 100% of its costs plus a reasonable profit.²⁴ Section

²⁰ 47 U.S.C. § 160.

²¹ *Verizon Petition* at iii.

²² *See, generally, Verizon Communications*, 535 U.S. 467 (2002) (concluding that TELRIC methodology is consistent with the requirements of Act, including section 251).

²³ Nowhere in its petition does Verizon allege that current TELRIC rates, including the rates applied to UNE-P, are below its costs. Even if Verizon had made such an allegation, however, the proper remedy would be to seek adjustment of the rates by filing evidence with the relevant state regulatory authority rather than asking the FCC to forbear entirely from the TELRIC pricing methodology.

²⁴ *See, e.g., Annual 1987 Access Tariff Filings*, 2 FCC Rcd 280, ¶ 31 (1986) (explaining that the Commission had not authorized “unrestrained departures from traditional cost-based pricing principles” by granting LECs additional pricing flexibility).

254(e) of the Act requires federal support to be explicit and prohibits the Commission from implementing new implicit support mechanisms like the one Verizon proposes.²⁵ The imposition of a new implicit subsidy would also fly in the face of the Commission's efforts to replace implicit subsidies associated with access charges with explicit support mechanisms in the CALLS and MAG proceedings.²⁶

The Commission has long recognized that ILECs cannot justify billing any access charges on top of UNE rates. In the *Local Competition Order*, the FCC concluded that purchasers of unbundled network elements should not be required to pay access charges, because the "payment of rates based on TELRIC plus a reasonable allocation of common costs, pursuant to section 251(d)(1), represents full compensation to the ILEC for use of the network elements that telecommunications carriers purchase."²⁷ Although the Commission adopted a transitional interim mechanism to preserve support flows until the completion of the universal service and access charge proceedings, that interim period ended long ago, and it is plainly contrary to the

²⁵ See 47 U.S.C. § 254 (e) (providing that universal service support should be explicit and sufficient); Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 458, 104th Cong., 2d.Sess. at 113 (explaining that support mechanisms should be explicit rather than implicit).

²⁶ See, e.g., *Access Charge Reform*, Order on Remand, FCC 03-164, CC Docket Nos. 96-262, 94-1, 99-249, 96-45, ¶10 (rel. July 10, 2003) ("CALLS Remand Order") (explaining that CALLS Order established a new interstate access support mechanism to replace implicit support in the interstate access charges of price cap carriers); *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Third Order on Reconsideration, 18 FCC Rcd 10284 (2003) (explaining that MAG Order created a new, explicit universal service support mechanism to replace implicit support in the access rate structure of rate-of-return carriers).

²⁷ *Local Competition Order*, ¶ 721.

statute to let the ILECs resurrect it here.²⁸ Verizon has failed to explain how the Commission could reverse these decisions in response to its Petition for Forbearance, or to provide a valid reason why the agency should do so if it could.

The relief that Verizon seeks is also contrary to FCC's determination that leased UNEs, including UNE-P, are considered to be the lessee's "own facilities" even though the CLEC does not hold absolute title to them.²⁹ CLECs that are operating as a facilities-based carriers when they employ UNEs to offer services are entitled under the Act to bill and collect access charges, as the Commission has concluded in past decisions.³⁰ In effect, Verizon is urging the Commission to rule that an ILEC should be permitted to provide its own service over the same UNE that it is providing to a CLEC and for which it is collecting TELRIC-based rates. This new type of "line-sharing" arrangement plainly is not contemplated by the Act or the FCC's rules. Nor is it contemplated by the TELRIC-pricing methodology, which is based on the assumption that the CLEC is leasing the entire UNE facility. Under Verizon's reasoning, if Verizon itself is using part of the UNE to provide exchange access service, then the leasing CLEC should not have to pay for the entire UNE.

²⁸ *Id.* at ¶ 720. In its May 7, 1997 *Access Reform First Report and Order*, the Commission reaffirmed its decision to exclude access charges from the sale of unbundled network elements. *See Access Charge Reform*, 12 FCC Rcd 15982 (1997).

²⁹ *See, e.g., Petition of US West Communications, Inc., for a Declaratory Ruling*, 17 FCC Rcd 17030, ¶ 13 (2002) (summarizing Commission's determination regarding facilities-based carriers in the *Universal Service Order*).

³⁰ This conclusion is consistent with the Act, in which Congress defined the term "network element" as a "facility or equipment" used in the provision of a telecommunications service, and it includes all "features, functionalities and capabilities" of the facility or equipment. 47 U.S.C. §153(29). The FCC codified a definition of the term "network element" almost verbatim from the statute. 47 C.F.R. §51.5. Verizon's petition is really an attempt to overthrow the statutory UNE regime.

Verizon seems to want the Commission to classify UNE-P as local exchange resale rather than a UNE. In so arguing, Verizon again confuses sections 251(c)(3) and 251(c)(4) of the Act, which gives new entrants the right to choose between resale and UNEs.³¹ Like Verizon's other arguments, the Commission and the courts have already thoroughly considered and rejected this argument, holding that sections 251(c)(3) and 251(c)(4) of the Act are separate.³²

In sum, Verizon's proposal must be rejected because the Commission cannot exercise its authority to forbear pursuant to section 10 of the Act in a manner that is fundamentally inconsistent with other sections of the Act (*e.g.*, section 254) or the Commission's existing rules and policies. Verizon has not, and indeed could not have, explained how the Commission could grant its petition consistent with the requirements of the Act, the APA and the Commission's current rules and policies.

B. TELRIC is an Appropriate Pricing Methodology for All UNEs, Including UNE-P

The logic upon which Verizon based its petition is fundamentally flawed. Specifically, the Verizon Petition is based on the assumption that state regulatory authorities are improperly implementing the TELRIC rules and methodology. As a result, Verizon alleges, the rates for UNE-P are too low.

By definition, the TELRIC-pricing methodology sends the correct investment signals to the telecommunications industry. As such, when state regulatory authorities apply the

³¹ 47 U.S.C. §§ 251(c)(3) and (c)(4).

³² *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 12 FCC Rcd 12460, 47 (1997) (explaining distinction between section 251(c)(3) and section 251(c)(4)).

TELRIC rules correctly, the resulting TELRIC-based rates are correct. Accordingly, there is no basis for Verizon's contention that fundamental flaws in the TELRIC-pricing methodology result in UNE-P rates that are "too low" or that provide distorted investment signals to ILECs and CLECs alike. Therefore, even if Verizon's allegations were true, the appropriate response would be to pursue means for ensuring that the states apply the TELRIC rules correctly, not to dispense with the TELRIC pricing methodology entirely.

IV. CONCLUSION

For the foregoing reasons, the Commission should deny Verizon's Petition for
Forbearance.

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Dated: August 18, 2003

CERTIFICATE OF SERVICE

I, Theresa A. Baum, a legal secretary at Kelley Drye & Warren LLP, do hereby certify that on this 18th day of August, 2003, unless otherwise noted, a copy of the foregoing "JOINT OPPOSITION," was sent by the means indicated to each of the following:

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